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In the

Supreme Court of the United States

OCTOBER TERM, 1944

Number 853

L. C. AKINS, *Petitioner,*

v.

THE STATE OF TEXAS, *Respondent.*

BRIEF OF PETITIONER UNDER HIS PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Statement of the Case	1– 4
Points Involved	4
First Point	4– 5
Second Point	5
Authorities under First and Second Points	6
Statement and Remarks under First and Second Points	6–15
Third Point	5– 6
Authorities under Third Point	15
Statement and Remarks under Third Point	16–21
Conclusion	21–22

Page

Akins vs. State (Texas), 167 S. W. Rep. (2nd Series) 758 6

Carter vs. Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687 ..... 6, 13

Cobley's Constitution, 5th Ed., Chapter IV, page 78 15, 17

Cooley's Constitution, 5th Ed., Chapter V, page 107 15, 17

Constitution of the United States, Fifth Amendment 6, 15

Constitution of the United States, Fourteenth Amendment, Section 1 ..... 6, 15

Constitution of Texas, Article 1, Section 19 15

Constitution of Texas, Article 5, Section 28 ..... 15, 16

Constitution of Texas, Article 5, Section 7 ..... 15, 17

Devoy vs. New York, 35 Barb. 264 15

Guinn, et al. vs. U. S., 238 U. S. 347, 55 Sup. Ct. Rep. 926 6

Hill vs. Texas, 316 U. S. 400, 62 Sup. Ct. Rep. 1048 6

Hobart vs. Hobart, 45 Iowa 501 ..... 15, 20

In Re Terrell, 34 Pacific Rep. 457, 52 Kansas 29 15, 21

Lane vs. Wilson, 307 U. S. 368, 50 Sup. Ct. Rep. 872 ..... 6, 13

Levy vs. Bigelow, 6 Ind. Appeals 677 ..... 15, 20

Martin vs. Texas, 200 U. S. 316, 26 Sup. Ct. Rep. 338 ..... 6, 13

Mason vs. Woerner, 16 Mo. 567 ..... 15, 20

Myers vs. Anderson, 238 U. S. 368, 55 Sup. Ct. Rep. 932 6

Neal vs. Delaware, 103 U. S. 370 6

Norris vs. Alabama, 294 U. S. 598, 55 Sup. Ct. Rep. 579 ..... 6, 12

People vs. Albertson, 55 N. Y. 50 15

Page

People vs. Blake, 40 Barb. 9 15

People vs. Opel, 58 N. E. Rep. 996, 188 Ill. 194 ..... 15, 21

People vs. Raymond, 37 N. Y. 428 15

Pierre vs. Louisiana, 306 U. S. 370, 59 Sup. Ct. Rep. 536 ..... 6, 11

Pierson vs. State (Texas), 177 S. W. (2nd) 975 ..... 15, 19

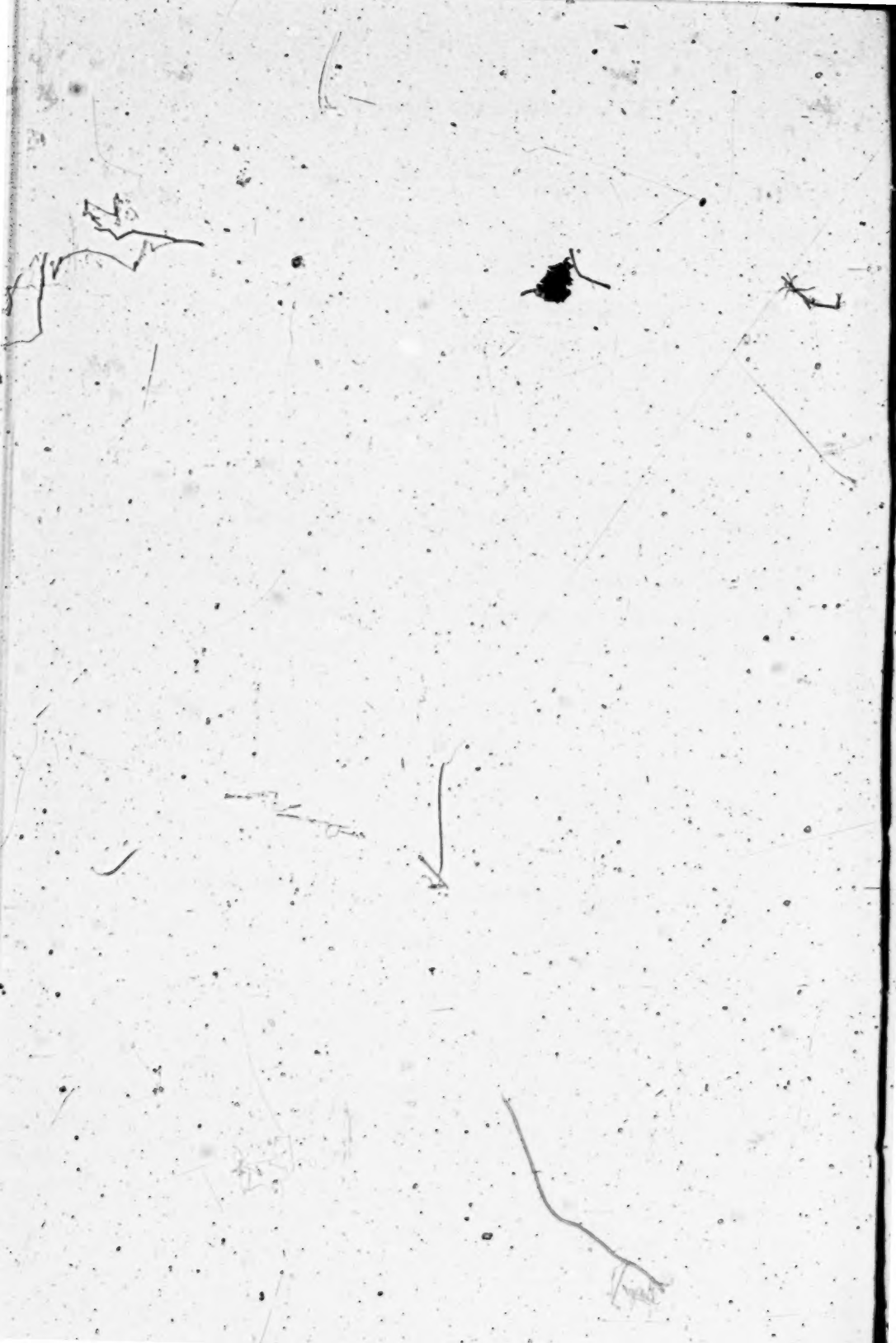
Revised Civil Statutes of Texas, Article 200-a, Section 5 ..... 15, 18

Scott vs. McNeal, 154 U. S. 34, Sup. Ct. Rep., Vol. -14, pages 1108-14 ..... 15, 19

Smith vs. State (Texas), 77 S. W. Rep. 453 ..... 6, 14

State vs. Goldstucker, 40 Wis. 124 ..... 15, 17

United States Ex Rel Jackson, et al. vs. Brady, Warden, 133 Fed. (2nd) 476 ..... 5, 10



In the

Supreme Court of the United States

OCTOBER TERM, 1944

Number.....

L. C. AKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

BRIEF OF PETITIONER IN SUPPORT OF HIS APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

STATEMENT OF THE CASE

Petitioner, L. C. Akins, an American citizen and a negro, was charged by indictment in the Criminal District Court of Dallas County, Texas, with the offense of murder. Prior to his trial he seasonably filed his motion to quash the indictment on the grounds that he had been denied due process of law, and equal protection of the law under the Fourteenth Amendment, Section 1, of the Constitution of the United States, by virtue of the fact that the Grand Jury that returned the indictment against this petitioner was selected in such a manner that discriminated against this petitioner and against the negro race;

that the Grand Jury Commissioners that selected the grand jury panel from which the grand jury was selected that returned the indictment against this petitioner intentionally discriminated against the negro race in that said Grand Jury Commissioners deliberately and intentionally limited the number of citizens of the negro race to one (1) that they would consider or permit to serve on said grand jury, and the name of the one member of the negro race selected on said grand jury panel from which said grand jury was selected was intentionally and deliberately placed on such panel in such position as to insure his serving on said grand jury, but, all other members of the negro race were intentionally and deliberately excluded from serving on said grand jury; that said manner of selecting said grand jury in fact discriminated against your petitioner and his race on account of his race and color; that such selection of said grand jury was an evasion of Petitioner's rights under the Fourteenth Amendment to the Federal Constitution, and the same was an artful, as well as tactful, evasion of the constitutional rights of this Petitioner, That there was a large number of negroes and members of the negro race who had paid their poll tax, qualified to vote, able to read and write, and qualified to serve on the grand jury in said County and in said court.

In support of said motion to quash the indictment testimony was taken before the Court, which adduced the fact that the Grand Jury Commissioners who selected the Grand Jury panel from which the Grand Jury that returned the indictment in this case was selected that indicted the Petitioner intentionally discriminated against

the Negro race in that said Grand Jury Commissioners deliberately and intentionally limited the number of Negro citizens to one (1) that they would consider or permit to serve on said Grand Jury. (This will appear fully from this Petitioner's Bill of Exceptions No. 1 as contained in the Transcript of the Record in this cause.) That thereupon the Court overruled said motion and defendant therein duly reserved his exceptions to said ruling.

That the regularly and duly elected, qualified and acting judge of said Criminal District Court, Judge Grover C. Adams, had theretofore died, thereby causing a vacancy in the office of the judge of said court, and the Governor of Texas not having filled said vacancy and no general election having intervened at which said vacancy had been filled, the Honorable A. R. Stout, the Judge of the 40th Judicial Court in and for Ellis County, Texas, appeared by virtue of an assignment by the Presiding Judge of the First Administrative Judicial District of Texas, and assumed to preside over and hold court for said Criminal District Court of Dallas County, Texas, and to preside over the trial of your Petitioner in this cause in said court. That upon the call of this cause, and before any announcement of ready had been had or any plea taken herein, your petitioner, in limine, filed and presented to said judge his objections to being tried in said Court at said time and before said Judge A. R. Stout, so assuming to preside therein, because of said vacancy in said office of judge of said court, and because the Presiding Judge of the First Administrative Judicial District of Texas had no legal authority to assign said judge to preside in the event

of a vacancy in the office of the judge of said court caused by the death of the judge thereof. Said objections were in writing and duly presented to said Judge A. R. Stout, so assuming to preside. That upon a hearing thereof it was duly stipulated in the record the facts of said death, said vacancy and the assignment of Judge A. R. Stout as aforesaid to preside in said Criminal District Court. Said objections were duly overruled by the acting judge and this Petitioner. These matters will appear from this Petitioner's Bill of Exceptions No. 2 as contained in the Transcript of the Record in this cause.

That thereupon the case was tried to a jury which resulted in the conviction of Petitioner with the penalty assessed at death. The cause was duly appealed to the Court of Criminal Appeals of Texas, which court affirmed the judgment of the court below, and Petitioner duly filed his motion for rehearing, which was overruled. Said judgment of affirmance and overruling said motion for rehearing are contained in the Transcript of the Record in this cause.

POINTS INVOLVED

First

The judgment of the Court of Criminal Appeals of Texas in affirming the judgment of the Criminal District Court of Dallas County, Texas, in this cause, and in overruling this Petitioner's motion to quash the indictment in this cause was and is contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and violated the rights of this Petitioner under

said amendment in that in the formation of the Grand Jury that returned the bill of indictment herein there was discrimination against the Petitioner and the members of the Negro or African race on account of race and color and this Petitioner was thereby denied the equal protection of the law, guaranteed him under said amendment to the Constitution of the United States.

Second

Said judgment of the Court of Criminal Appeals of the State of Texas in affirming the judgment of the Criminal District Court of Dallas County, Texas in this cause in overruling this Petitioner's motion to quash the indictment herein on account of racial discrimination against him and his race, deprives this Petitioner of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and in violation of the Fifth Amendment to said Constitution of the United States.

Third

The Honorable A. R. Stout, the Judge of the Fortieth Judicial District of Texas, in and for Ellis County, Texas, having no authority in law to preside as the judge of the Criminal District Court of Dallas County, Texas, in the trial of this cause, said trial and judgment rendered thereunder is a nullity, and the judgment of the Court of Criminal Appeals of Texas in affirming said purported judgment, and said purported judgment, do not constitute due process of law and thereby this Petitioner is being de-

prived of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of the Fifth Amendment to the Constitution of the United States.

Authorities under the First and Second Points

Constitution of the United States, Fourteenth Amendment, Section 1;

Constitution of the United States, Fifth Amendment;

Hill vs. Texas, 316 U. S. 400, 62 Sup. Court Rep. 1048;

Akins vs. State (Texas), 167 S. W. Rep. (2nd Series) 758;

Pierre vs. Louisiana, 306 U. S. 370, 59 Sup. Ct. Rep. 536;

Neal vs. Delaware, 103 U. S. 370;

United States Ex Rel Jackson et al. vs. Brady, Warden, 133 Fed. (2nd) 476;

Norris vs. Alabama, 294 U. S. 598, 55 Sup. Ct. Rep. 579;

Lane vs. Wilson, 307 U. S. 368, 50 Sup. Ct. Rep. 872;

Guinn et al. vs. U. S., 238 U. S. 347, 55 Sup. Ct. Rep. 926;

Myers vs. Anderson, 238 U. S. 368, 55 Sup. Ct. Rep. 932;

Carter vs. Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687;

Martin vs. Texas, 200 U. S. 316, 26 Sup. Ct. Rep. 338;

Smith vs. State (Texas), 77 S. W. Rep. 453.

Statement and Remarks

Upon the hearing of the motion to quash the indictment herein the testimony adduced, as shown by your Petitioner's

Bill of Exceptions No. 1 in the Transcript of the Record herein, the 1940 United States Census showed that the population of Dallas County, Texas, consisted of 336,851 white population and 61,605 negro population. That prior to the October, 1942 term of the Criminal District Courts of Dallas County there had never been a member of the Negro or African race on a grand jury in Dallas County, Texas. That after this Court reversed the case of *Hill vs. Texas*, in June 1942 one negro was put on the grand jury for the October, 1942, term, and one put on the January, 1943 term, it being the grand jury that returned the bill of indictment against your Petitioner in this cause. That the Grand Jury Commission that selected the grand jury panel for said January, 1943, term of said court consisted of three men, to-wit:—W. H. Wells, Roy E. Douglas and Ernest R. Tennant, all of whom testified on said hearing. They were selected as such commissioners by Judge Grover C. Adams. W. H. Wells testified "We were advised by Judge Grover Adams that the Supreme Court had ruled that we could not discriminate against any one because of his color, if I recall, they had not been discriminating for selection of the grand jury panel; and in turn they said there were sixteen, and it would be further evident if we placed one among the twelve so it would be clear." Again, "We had no intention of placing more than one negro on the panel. When we did that we had finished with the negro. That was the suggestion of the others and what Judge Adams thought about the selection of the grand jury."

Roy E. Douglas testified "At that time, Judge Adams, the judge of this court, made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it well to select a negro on the grand jury. There was no further discussion about that. We did select a negro on the grand jury." Again, "Yes, sir, there were other negroes' names mentioned besides the one we selected. We did not go talk to them; we liked this one, and our intentions were to get just one negro on the grand jury; that is right." Again, "I cannot say as to others as to what they were thinking about; all that I had in my mind was that it was not my intention to put more than one negro on the grand jury. That was my mind. It was my intention to put just one on so they would be represented on there."

Ernest R. Tennant testified "I did not have any intention of putting more than one on the list."

A number of county officers, deputies and former county officers and old residents of Dallas County testified that prior to October, 1942, no negroes had ever served as a grand juror in Dallas County, Texas. A number of the leading members of the negro race residents of Dallas County, including ministers, school-teachers, doctors, merchants, insurance and real estate dealers and lodge officials testified to the number of the negro population of Dallas County, and that the greater majority of them possessed the legal qualifications for a grand juror.

Your petitioner respectfully submits that the grand jury commissioner show, by their own testimony, that the

placing of the one negro on the grand jury panel was not a bona fide attempt to comply with the law as announced by this Court in the authorities cited, but was a subtle and artful attempt to evade the law, and that thereby this Petitioner was discriminated against and denied the equal protection of the law and was denied due process of law.

In the case of *Smith vs. The State of Texas*, 311 U. S. 128, Mr. Justice Black writing the opinion, it is said:

> "Officers of a State tribunal may not cover up their intended discrimination against the Negro race by a thin veneer of compliance and thereby evade the prohibition of the Fourteenth Amendment.
>
> "The Fourteenth Amendment requires that equal protection to all must be given—not merely promised. Here, the Texas Statutory scheme is not in itself unfair; it is capable of being carried out with no racial discriminations whatsoever. But, by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable.
>
> "The State argues that the testimony of the commissioners themselves show that there was no arbitrary or systematic exclusion. And it is true that two of the three commissioners who drew the September, 1938, panel testified to that effect. Both of them admitted they did not select any negroes although the subject was discussed, but both categorically denied that they intentionally, arbitrarily or systematically discriminated against negro jurors as such.
>
> "What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where the jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commission-

ers who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or uningeniously, the conviction cannot stand."

In the case of the *United States ex rel, Jackson ex rel vs. Brady, Warden*, 133 Federal (2nd) 476, Mr. Justice Soper of the Circuit Court of Appeals, Fourth Circuit, says:

"A salutary warning on this subject was given the courts on September 8, 1942, in the report to the conference of the Chief Justice with the Senior Circuit Judges of the United States by a committee on Selection of Jurors, composed of District Judges of the United States. The report states:

"In each district where there is a large negro or other minority racial group the problem of selecting a suitable number of qualified representatives of that race is one that should receive the careful consideration of the clerk and the jury commissioner. The constitution together with the statutes and decisions, make it evident that any thing that amounts to a conscious and deliberate exclusion from jury lists of representatives of any class of persons on account of race, color, economic or social status is improper and may be unlawful. The selection of qualified persons to give adequate representation to certain groups may in some districts present difficulties. Nevertheless no jury panel can be regarded as secure from challenge unless there has been an earnest effort on the part of the Court, the Clerk and the Jury Commissioner to assure that there is no discrimination against these groups.

"Since the Scottsboro cases it has been the practice in several courts to include in the jury boxes the names of a few negroes to avoid the violations of the Fourteenth Amendment. The validity of this method may be questioned in the light of the Supreme Court's language in the case of Smith v. Texas, 1940, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84.

"In the last mentioned case, which considered the composition of the Grand Jury challenged by one convicted of crime, the number of negroes called for service and actually permitted to serve for a long time had been so scanty as to compel the conclusion that negroes had been arbitrarily and systematically excluded because of their race. In the pending case, considering the number of negro jurymen in service in Baltimore during a long period of years in comparison with the substantial size of the negro population, and taking this fact separate and apart from the surrounding circumstances, one might be disposed to infer that an intentional and systematic effort had been made to cut down the number of negro jurymen in such a fashion as to create the superficial appearance of obeying the constitutional mandates while actually ignoring them."

In the case of *Pierre vs. Louisiana*, 306 U. S. 354, 59 Sup. Ct. 536, Mr. Justice Black rendering the opinion for the Court, stated:

"Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests. Indictment by grand jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service. The Fourteenth Amendment intrusts those who because of race are denied equal protection of the laws in a State first to the revisory power of the higher courts of State, and ultimately to the review of this Court.

"Principles which forbid discrimination in the selection of petit juries also govern the selection of grand

juries. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color."

Mr. Chief Justice Hughes, in the case of *Norris vs. Alabama*, 294 U. S. 598, 55 Sup. Ct. Rep. 579, states:

"When a Federal right has been specially set up and claimed in a State court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a State court as to Federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the Federal right may be assured.

"* * * And the commissioner testified that in the selections for the jury roll no one was automatically or systematically excluded, or excluded on account of race or color; that he 'did not inquire as to color,' that was not discussed.

"* * * But, in appraising the action of the commissioners, these statements cannot be divorced from other testimony. As we have seen, there was testimony, not overborne or discredited, that there were in fact negroes in the county direct and specific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of others remained. The fact that the testimony as to these persons fully identified, was not challenged by evidence appropriately direct, cannot be brushed aside."

In *Lane vs. Wilson*, 307 U. S. 368, 50 Sup. Ct. Rep. 872, in an opinion of this Court by Mr. Justice Frankfurter, it is stated:

> "We, therefore, cannot avoid passing on the merits of plaintiff's constitutional claim. The reach of the Fifteenth Amendment against contrivances by a State to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. Guinn v. United States, 238 U. S. 347, 55 S. Ct. 926, 59 L. Ed. 3140, L. R. A, 1916A, 1124. Myers v. Anderson, 238 U. S. 368, 35 S. Ct. 932, 59 L. Ed. 1349.
>
> "The amendment nullified sophisticated as well as simple minded modes of discrimination. It hits onerous procedure requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. When in Guinn v. United States, supra, the Oklahoma 'grandfather clause' was found violative of the Fifteenth Amendment, Oklahoma was confronted with a serious task of devising a new registration system consonant with her own political ideas but also consistent with the Federal Constitution. We are compelled to conclude, however, reluctantly, that the legislation of 1916 partakes too much of the infirmity of the 'grandfather clause' to be able to survive."

We submit in addition to the foregoing the following statement of this Court in *Carter vs. Texas*, 177 U. S. 442, 20 S. Ct. 687, and *Martin vs. Texas*, 200 U. S. 316, 26 S. Ct. 338, to-wit:

> "What an accused is entitled to demand, under the constitution of the United States is that, in organizing the grand jury, as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

Furthermore the attention of the Court is directed to the language of Judge Henderson of the Texas Court of Criminal Appeals in *Smith vs. State*, 77 S. W. Rep. 453, as follows:

> "An effort to comply with the Fourteenth Amendment and the decisions thereunder, instead of endeavoring to avoid the same, in a colored population shown to exist in Grayson County, might have entitled the negro race to a greater representation on both the grand and petit juries than here shown.
>
> "While we fully understand the sentiment that may have actuated the officers of the court below, and appreciate their disinclination to place the administration of the law, even in part, in the hands of a people assumed to be inferior to the white race, yet under the law and before the law all are equals, and in its administration no favors can be shown, nor can either the letter or spirit of the law be ignored."

In support of our contention herein under the First and Second Points above, we adopt the language of the Supreme Court in the foregoing citations as our brief and argument; we respectfully submit that the grand jury commissioners in the selection of the grand jury panel in putting one negro on the panel and limiting their consideration of the negro race to one, "covered up their intended discrimination against the negro race by a thin veneer of compliance and thereby evaded the prohibition of the Fourteenth Amendment," and proceeded "in such a fashion as to create the superficial appearance of obeying the constitutional mandates while actually ignoring them," and that they discriminated against this Petitioner and his race on account of color and race, thereby depriving him of the

equal protection of the law guaranteed him by the Fourteenth Amendment to the Constitution of the United States in Section 1 thereof.

Authorities under Third Pont

Constitution of the United States, Fourteenth Amendment, Section 1;
Constitution of the United States, Fifth Amendment;
Constitution of Texas, Article 1, Section 19;
Constitution of Texas, Article 5, Section 28;
Constitution of Texas, Article 5, Section 7;
Cooley's Constitution, 5th Ed. Chapter V, page 107;
Cooley's Constitution, 5th Ed. Chapter IV, page 78;
Scott vs. McNeal, 154 U. S. 34, Sup. Ct. Rep. Vol. 14, pp. 1108-14;
Revised Civil Statutes of Texas, Article 200-a, Section 5;
Pierson vs. State (Texas), 177 S. W. (2nd) 975;
People vs. Raymond, 37 N. Y. 428;
Devoy vs. New York, 35 Barb. 264;
People vs. Blake, 40 Barb. 9;
People vs. Albertson, 55 N. Y. 50;
State vs. Goldstucker, 40 Wis. 124;
Mason vs. Woerner, 16 Mo. 567;
Hobart vs. Hobart, 45 Iowa 501;
Levy vs. Bigelow, 6 Ind. Appeals 677;
In Re Terrell, 34 Pacific Rep. 457, 52 Kansas 29;
People vs. Opel, 58 N. E. Rep. 996, 188 Ill. 194.

Statement and Remarks

This cause was tried in the Criminal District Court of Dallas County, Texas, with the Honorable A. R. Stout, the Judge of the 40th Judicial District Court of Texas in and for Ellis County, Texas, presiding. Your petitioner in limine challenged the right of said Judge of the 40th Judicial District to preside upon the trial of this cause which challenge was in writing, and was by said Judge Stout overruled. This will fully appear from your Petitioner's Bill of Exceptions No. 2 as contained in the Transcript of the Record in this cause. By stipulation as contained in said Bill of Exceptions No. 2 it is shown that Judge Grover C. Adams was the regularly elected and qualified and acting judge of said Criminal District Court of Dallas County, Texas; that Judge Adams died August 25, 1943, during the July term, 1943 of said court; and that the Governor of Texas had not appointed a judge to fill the vacancy caused by the death of Judge Adams. That Judge A. R. Stout, judge of the 40th Judicial District of Texas in and for Ellis County, Texas, was acting herein by virtue of an assignment by Judge Claude M. McCallum, Judge of the 101st Judicial District Court of Dallas County, Texas, and acting as the Presiding Judge of the First Administrative Judicial District of Texas, and not by virtue of any appointment by the Governor of the State of Texas. That by reason of said death a vacancy occurred in the judgeship of said court that had not been filled at the time of the trial of this cause. The *Constitution of Texas*, Article 5, Section 28, provides the only method by which such vacancies *shall* be filled, as follows:

"Vacancies in the office of Judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Courts *shall* be filled by the Governor until the next succeeding general election." Thus it will be observed that the people by their constitution delegated the power to the Governor alone to fill vacancies, temporarily, in the named judgeships in the event of vacancies. No power in the matter was given the legislature at all, either to act itself or authorize any other officer to act in the premises. *Cooley's Constitution*, 5th Edition, Chapter V. page 107 says "Every positive declaration contains an implication against anything contrary to it, or which would frustrate or disappoint the purposes of it." Again, the same author, in Chapter IV, page 78 of the same volume says, "Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or extend the penalty to other cases." The case of *State vs. Goldstucker*, 40 Wisconsin 124, holds that "the legislature cannot provide for the choice of officers a different mode from that prescribed by the constitution."

The *Constitution of Texas*, Article 5, Section 7 gives the legislature the right to provide for the holding of District Court "when the judge thereof is absent, or is from any cause disabled or disqualified from presiding." This does not apply to vacancies or the filling of vacancies. Under the powers so given the legislature has provided for the election of a special judge by the lawyers of the court when the judge is absent; and it also enacted Article 200-a

of the Revised Civil Statutes of Texas. This Article creates Administrative Judicial Districts, a Presiding Judge of said Districts, and in Section 5 thereof, as originally enacted, it provided that "Judges may be assigned in the manner herein provided for the holding of District court when the regular judge thereof is absent or is from any cause disabled or disqualified from presiding, and in instances where the regular judge is present or himself trying cases where authorized or permitted by the Constitution and laws of the State." The 48th Legislature of Texas, in 1943, amended said Section 5 of Article 200-a of the Revised Civil Statutes of Texas, by adding to said Section the following: "And judges may also be assigned in the manner herein provided for the holding of a District Court, when by reason of the death, resignation, or from any cause whatsoever, the office of the District Judge of the District is, or has become vacant."

To show that it was the intent of the Legislature in passing said amendment to provide for the filling of a vacancy in the office of the judge of said courts, the emergency clause appended to said amendment reads "The fact that no clear provision of law exists at the present time to authorize the assignment of a District Judge *to fill a vacancy in case of death*, resignation, or for other reasons creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each house be suspended, and said Rule is suspended" etc. Petitioner submits that by this amendment the Legislature attempted to do, and provide for the doing of, what the people by their Constitu-

tion delegated solely to the Governor of the State; and that said amendment is unconstitutional and void, and conferred no authority on the Presiding Judge of the First Administrative Judicial District of Texas, to assign Judge Stout to preside over the trial of this cause, and that Judge Stout, by said assignment, acquired no legal right to so preside in said Criminal District Court or upon the trial of your Petitioner herein, and that his acts in so doing were absolutely void, and that the judgment of conviction herein is absolutely void. That by reason thereof this Petitioner is being deprived of his life without due process of law.

This Court in the case of *Scott vs. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108 (on page 1112) says:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.
>
> "The words 'due process of law' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit.*' Tested by this rule Petitioner was not given a trial by due process of law. There was no legal court."

In the case of *Pierson vs. State*, 177 S. W. (2nd) 975, tried below in the Criminal District Court of Dallas County, and to which an outside judge had been assigned

in the same manner as in this case, our Court of Criminal Appeals of Texas, held "Appellant correctly asserts that the power to appoint a successor to a deceased district judge lies exclusively with the Governor of this State. The Constitution expressly so provides. It is also true that the Governor has not seen proper to appoint a successor to Judge Adams, and the Office of Judge of the Criminal District Court of Dallas County is now vacant." It further holds that the assigned judges "did not relinquish the offices they held, nor did they attempt to qualify as the successor of Judge Adams. *They did not purport to act as judge de jure or de facto of the Criminal District Court of Dallas County.*"

Petitioner submits that if that be true he was tried before a court that had no judge, the office of judge was vacant. That such is not a court. Mr. Bouvier defines a "court" to be "an incorporeal political being which requires for its existence the judges, or a competent number of them, and a clerk or prothonotary, at the term during which, and at the place where, it is by law authorized by law to be held, and the performance of some public act indicative of a desire to perform the functions of a court. In another sense, the judges, clerk or prothonotary, counsellors and ministerial officers are said to constitute a court." This definition has been expressly approved in *Mason vs. Woerner*, 18 Mo. 567 and *Hobart vs. Hobart*, 45 Iowa, 501, and *Levy vs. Bigelow*, 6 Indiana Appeals, 677.

In the cases of *Re Terrell*, 34 Pacific Rep. 457, 52 Kansas, 29, and *People vs. Opel*, 58 N. E. Rep. 996, 188 Illinois, 194, it is held that "The judge is an essential constituent of a court, and there can be no 'court' in the absence of the judge or judges." "A court can have no existence without a judge." Also, "A court has been defined to be a body in government for the public administration of justice at the time and place prescribed by law; *and it has been said that a 'court' is an incorporeal being which requires for its existence the presence of the judge.*"

Your Petitioner most respectfully insists that he was tried before a body that was not a "court" in law because of the unfilled vacancy in the office of the judge, and presided over by a judge of another court, not as the judge either de facto or de jure of said court, and whose assignment thereto was not by virtue of any legal authority. That he is being deprived of his life without due process of law, said proceedings not constituting "due process of law" as guaranteed him by the Constitution of the United States and of Texas.

For the foregoing reasons your Petitioner most respectfully submits that the Writ of Certiorari herein applied for should be granted and that the judgment of the Court of Criminal Appeals of Texas herein should be reviewed, and, upon review should be in all things reversed and held for naught; and this cause remanded to said Court of

Criminal Appeals for further orders in accordance with the Judgment of this Court.

Respectfully submitted,

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and

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Service of a copy of the foregoing brief, together with copy of Petition for Writ of Certiorari was made on the Attorney General of Texas, Attorney for Respondent, by mail, on this, the 12th day of January, 1945.

W. J. DURHAM,
Of Counsel.